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No. 85-1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHASE RIVELAND, Executive Director, Colorado Department of Corrections,

Petitioner,

v.

RICHARD LEE BALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3968

QUESTION PRESENTED FOR REVIEW

Should this Court review the correctness of the Tenth Circuit's decision invalidating a guilty plea entered in 1957 by a sixteen-year-old boy, without counsel, and without notification or presence of his parents?

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The Petitioner herein (who was the Respondent in the District Court below, and the Appellant in the Tenth Circuit below) will be referred to as the State or as the prosecution. Respondent (who was the Petitioner in the District Court below, and the Appellee in the Tenth Circuit below) will be referred to by name.

STATEMENT OF THE FACTS

I. 1957 GUILTY PLEA HEARING

At issue in this case is the constitutional defectiveness of a guilty plea entered in state court in 1957 when Mr. Ball was 16 years old. Despite his age, Mr. Ball appeared in adult court, not juvenile court.[1] He was not represented by an attorney, and

1. In trial court and appellate proceedings below in the state courts, Mr. Ball also challenged the 1957 court's jurisdiction. The basis of this challenge was the Colorado statute in effect in 1957 giving the state's county courts, except in certain cases not applicable here, jurisdiction over all criminal cases against minors. Colo. Rev. Stat. § 37-8-1. This challenge was rejected by the Denver District Court and the Colorado Court of Appeals. It was rejected by the United States Magistrate, even though it had not been raised in Mr. Ball's habeas petition.

his parents were not present.

The information filed against Mr. Ball contained six charges--burglary, theft, theft by receiving, and three counts of conspiracy. All these charges pertained to a single incident alleged to have occurred on September 21, 1957. Mr. Ball, along with three co-defendants, was arrested that day and held in the Denver Jail.

Nine days later, Mr. Ball, along with his three co-defendants, appeared in the Denver District Court for arraignment. (The transcript of this hearing is attached as Appendix 1.) Two of the three co-defendants were represented by attorneys, and their cases were continued at the attorneys' requests.

The court advised Mr. Ball that he had a right to a "postponement, if you want, to give you some short time within which to talk to a lawyer," and asked if he wanted to talk to a lawyer before being arraigned. Mr. Ball replied, "No, sir." The court then stated its understanding that Mr. Ball was aware of his right to talk with a lawyer but that he "simply" did not want to do so. Mr. Ball replied, "Yes, sir." The court again stated that Mr. Ball could talk to a lawyer before being arraigned, "and you do not desire to do that, is that correct?" Mr. Ball again responded, "Yes, sir." Finally, the court stated:

> I don't want to talk you out of it, but I want to make certain that you understand clearly what the issue is. I have a duty under the statutes to appoint counsel if you are indigent. But as I understand it, you want to go ahead and be arraigned right now, is that correct?

Mr. Ball again responded, "Yes, sir." The court then provided Mr. Ball with a copy of the six-count information against him,[2] and stated:

---

2. Only the one charge of burglary was discussed in the plea-advisement proceedings, with the record not indicating the disposition of the other five charges, as the Magistrate below found.

> Now, you may or may not know that the first count charges you with burglary. I am going to read the charge to you, and you might want to follow me as I read. The charge is that Richard Lee Ball, on September 21, 1957, at Denver, Colorado, the office, shop and storehouse there situate of George W. Caughren, doing business as Barnum Creamery, then and there feloniously, burglariously, willfully, maliciously and forcibly did break and enter, and feloniously, burglariously, willfully and maliciously without force did enter, with intent, the moneys, goods and chattels of the said George W. Caughren, doing business as Barnum Creamery, in the said office, shop and storehouse, then and there being, then and there feloniously and burglariously to steal, take and carry away.
>
> Now the charge is burglary. How do you want to plead?
>
> DEFENDANT BALL: Guilty, sir.

Without any further advisement or inquiry of any kind concerning this charge, other than the possible penalty, the court then accepted the guilty plea.

II. SUMMARY OF THE PROCEEDINGS BELOW

A. State Court Proceedings

1. Jefferson County District Court

Mr. Ball was charged in 1978 in the Jefferson County (Colorado) District Court with several charges of theft and conspiracy, and five allegations that he had been previously convicted of separate felonies. These allegations were brought pursuant to Colorado's "habitual criminal" statute, which requires, upon conviction for a substantive felony offense, a life sentence if the defendant is found by the trier of fact to have been three times previously convicted of "separately brought and tried" felonies, and a sentence from 25 to 50 years if the defendant is found to have been twice so previously convicted. Colo. Rev. Stat. § 16-13-101 (Appendix 2).

One of the five alleged prior convictions was dismissed before trial in 1979. In the middle of a jury trial, Mr. Ball withdrew his not guilty plea and pled guilty to three charges of

theft and one of conspiracy. Jury trial then continued as to the habitual-criminal allegations.

Before trial began, Mr. Ball's attorney moved to dismiss the allegation pertaining to the 1957 Denver conviction, alleging the constitutional defectiveness of the guilty-plea proceeding.[3] The trial court considered the transcript of that proceeding, but conducted no evidentiary hearing. It denied the motion to dismiss, finding that although the Denver court in 1957 had not explained every element of the offense and had not done anything other than read the first count of the information, "[t]here's no indication that this defendant didn't know what he was doing at the time he was asked specific questions and gave specific

The jury found that Mr. Ball had not been identified as having been convicted of one of the alleged prior felonies, but found that he had been previously convicted of the other three alleged felonies, including the 1957 Denver conviction. Mr. Ball was later sentenced to life imprisonment, and initiated an appeal of his habitual-criminal adjudication in the Colorado Court of Appeals.

2. Denver County District Court

While this appeal was pending, Mr. Ball filed a motion pursuant to Colorado's post-conviction procedures, Colo. Crim. P. 35(c), in the Denver District Court, challenging the constitutional defectiveness of the 1957 conviction in that court. The trial court conducted an evidentiary hearing, at which Mr. Ball was the only witness.

Mr. Ball testified that at the time of the plea he was a 16-year-old high-school student, who had previously failed two grades and had been "skipped" past the ninth grade because he was

3. Also the subject of motions to dismiss were the other two alleged convictions. These motions were denied, and were not the subject of any federal-court proceedings. answers."

too old to continue in junior high. He had previously pled "nolo contendere" in a prior municipal court case, in which he was not represented by an attorney.

Prior to his arrest in 1957, he had left home to avoid further beatings from his father, and spent part of the time sleeping in the park. He did not call his parents to let them know he had been arrested, because he was "afraid the court would make them pay for whatever I was concerned in."

Mr. Ball also testified that he had not talked to his parents or to an attorney during the nine days he spent in jail before appearing in court. He did not understand the terms used in court, such as "arraignment," and did not know the difference between a felony and a misdemeanor. He thought "indigent" meant "like a wino," and did not really understand it. He testified that he was "afraid to ask for a lawyer or tell them that I wanted to talk to one."

He had not read the charge against him before being handed a copy of the information in court, and could not read along as it was being read aloud because of his poor reading ability. He testified that he did not understand what the court read to him, did not understand the words used in the charge, did not understand the charge itself, and did not know its requisite elements.

Finally, Mr. Ball testified that he lied about his age when he was in court by saying that he was 17 instead of 16, because "one of the co-defendants was a girlfriend and I had been telling her...that I was a year older than I was, and I didn't want to admit to her I was younger."

At this hearing, the prosecution conducted no cross-examination, and did not ask Mr. Ball a single question.

The Denver court denied any relief, stating that even though

the elements of burglary were not explained, it would find that he did understand "what was going on in the court" and the nature of the charge. An appeal was also initiated from this order, and consolidated with the prior appeal in the Colorado Court of Appeals.

3. Colorado Court of Appeals

On appeal, the Colorado Court of Appeals in 1982 affirmed the holdings of both the Denver and Jefferson County District Courts. It held that Mr. Ball had validly waived an attorney, and that "the applicable requirements for a voluntary guilty plea were met." (Appendix A of the Petition for Writ of Certiorari.) Mr. Ball petitioned the Colorado Supreme Court for a writ of certiorari, which was denied.

B. Federal Court Proceedings

1. Inicial Proceedings

Mr. Ball next filed a petition in 1982 for a writ of habeas corpus in the United States District Court in Colorado. The prosecution responded to the Court's Order to Show Cause with an Answer, claiming that no federal constitutional issue existed because the state appeallate court's decision had "hinged" upon questions of fact. The District Court assigned the case to a United States Magistrate for discovery and other pretrial proceedings.

In December of 1982, the Magistrate issued an order setting a discovery and settlement conference. Counsel for both Mr. Ball and the prosecution jointly filed a response to this order, stating their agreement that the case be decided on the basis of the record developed in the state court proceedings, and their agreement "that no further evidentiary hearing is needed."

In January of 1983, the Magistrate inquired whether the case could be decided on the basis of the already-compiled state court record. On February 23, 1983, counsel for the prosecution sent

Mr. Ball's counsel a letter stating in part:

> We have decided that all of the papers filed in this case so far make it abundantly clear that there is no factual dispute not resolved in the state courts.... A decision can be and should be made on the petition, the answer to show cause order and the supporting documents.

Later that month, both parties reaffirmed this agreement at a status conference, which resulted in the Magistrate ordering transmission of the state court records. Oral arguments were held before the Magistrate the next month.

2. Magistrate's Recommendations and District Court Proceedings

On July 27, 1983, the United States Magistrate issued lengthy written findings and a recommendation that Mr. Ball's habeas petition be granted. (Petitioner's Appendix B.) The Magistrate's findings concerned the "historical" facts surrounding the 1957 guilty-plea proceeding. He found, for instance, that when Mr. Ball appeared in court in 1957, he was "a sixteen year old boy with multiple family and educational problems." He also expressly referred to the findings which had been made by the state trial courts as discussed above, but noted that "all of the state court opinions fail to enter any findings as to the critical factual issues."

The Magistrate specifically found that, prior to his arraignment, Mr. Ball had not been informed of the charges against him, and that his parents had not been informed that he had been arrested or that he was being arraigned. He further found that the state courts had ignored the lack of any attempt "to insure that his parents had been properly notified of the charges, and that their son was in court." Citing In re Gault, 387 U.S. 1, 31, 41 (1966), the Magistrate noted that both a child and the parent must be given notice of the charges and the right to counsel.

The Magistrate also found that the court in 1957 did not inquire into Mr. Ball's ability to read, his educational background, the reason for his parents' absence, or his ability to understand either the charge against him or the plea he offered. Specifically, the Magistrate found that Mr. Ball was never asked whether he understood the charge against him at any point in the plea proceedings.

From these findings, the Magistrate concluded that Mr. Ball had not waived his right "to be fully advised of the charges and to understand those charges before he plead guilty." The Magistrate also found that Mr. Ball had not voluntarily waived his right to be represented by an attorney.

In response to the Magistrate's findings and recommendations, the prosecution filed lengthy written objections. It did not request an evidentiary hearing, or any opportunity to present any additional information. Appended to the prosecution's objections, however, was six pages of a purported "probation report." This report had never been part of the record at any stage of any of the prior proceedings.[4]

Counsel for Mr. Ball then filed a response objecting to any consideration of such material not part of the record. In arguments before the United States District Court, counsel for the prosecution agreed to withdraw the never-before presented "probation report." The District Court then remanded the case back to the Magistrate for consideration of an issue raised in Mr. Ball's petition that had not been addressed in the findings and recommendation,[5] and for consideration of a two-page

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4. The prosecution's objections did not mention that this report was not part of the record. Counsel for the prosecution later claimed to have been unaware of this fact.

5. This issue, concerning the sufficiency of evidence in Mr. Ball's 1978 trial, was not the subject of any proceedings before the Tenth Circuit.

"Application for Probation." This two-page document, unlike the six-page "report," had been a part of the record since the post-conviction proceedings in the Denver trial court, but had not been specifically referred to by the Magistrate.

After remand and additional oral arguments, the Magistrate issued additional written findings and conclusions of law, and again recommended that Mr. Ball's petition be granted. (Petitioner's Appendix C.) Apparently the Magistrate considered not only the two-page probation application but also the six-page probation report which the prosecution had already agreed would be withdrawn from consideration. The Magistrate again found that the court in 1957 did not explain the charge and that Mr. Ball was then neither advised "on or off the record of the nature of the charge" nor asked if he understood it. The Magistrate found further that post-plea admissions in the "Application for Probation" did not cure the plea proceeding defects, since there was still no evidence that Mr. Ball had at any time acknowledged before any court that he had any knowledge of the actual crime of burglary.

The prosecution again filed written objections, but again did not request any opportunity to present additional evidence. The District Court provided an opportunity for oral arguments, but the prosecution declined to present any.

On December 20, 1983, the United States District Court issued an order granting Mr. Ball's habeas petition, and approving the Magistrate's recommendation. (Petitioner's Appendix D.) In so doing, the Court noted its "extreme reluctance to interfere with the process of state criminal cases."

The prosecution then initiated an appeal of this order.

Despite the order granting Mr. Ball a writ of habeas corpus,

the State of Colorado continued to hold Mr. Ball in custody and refused to release him without a specific order from the District Court. Counsel for Mr. Ball then filed a motion for his enlargement upon bond pending the prosecution's appeal, pursuant to Fed. R. App. Proc. 23(c). The prosecution opposed this motion generally, but did not suggest any alternatives to outright release. The District Court ordered Mr. Ball's release on a $20,000.00 co-signed appearance bond.

3. Tenth Circuit Proceedings

The prosecution filed a Docketing Statement in the Tenth Circuit Court of Appeals, setting forth the "questions presented" as being whether the District Court had properly determined that Mr. Ball's 1957 guilty plea was entered involuntarily, and, specifically, whether the Magistrate was correct "in refusing to consider evidence contained in the 1957 probation report."

After briefing and arguments, on December 16, 1985, the Tenth Circuit issued an opinion affirming the grant of habeas corpus. (Petitioner's Appendix E.) This opinion did not expressly reach the conclusions of law reached by the Magistrate and affirmed and adopted by the District Court. Instead, it noted the "special procedural protections [which] are constitutionally required when children are charged with criminal offenses," and the lack of any indications that state or local officials had contacted Mr. Ball's parents to tell them that their son was in jail or to inform them of his arraignment hearing. The Tenth Circuit then held that despite the deference owed state court's findings, here those courts had incorrectly applied federal law to the facts before them by not invalidating Mr. Ball's plea because of the lack of parental notification.

Again the prosecution filed written objections in the form of a Petition for Rehearing, and now for the first time requested an evidentiary hearing. Attached to the petition was a portion

of the same six-page "probation report," still not part of the record, which the prosecution had earlier withdrawn from any judicial consideration. The prosecution claimed this material showed that Mr. Ball's parents had somehow and at some time been notified of their son's arrest. The prosecution did not claim to have any evidence that his parents had been notified of their son's court date, or had received the constitutionally-required written notification of the charges against him.

The Tenth Circuit denied the petition for rehearing, and the prosecution then petitioned for certiorari.

III. MR. BALL'S CURRENT STATUS

The Petition for Writ of Certiorari notes at page 7 that Mr. Ball has accumulated several new cases since his release on bond pending appeal. Counsel has personally investigated this situation and has obtained copies of the following state-court felony charges now pending against Mr. Ball:

Adams County - Second-Degree Burglary, Conspiracy to Commit Second-Degree Burglary (two counts).

Arapahoe County - First case: Second-Degree Burglary;
Second case: Aggravated Robbery, First-Degree Burglary, Second-Degree Burglary, Theft.

Denver County - First case: Second-Degree Burglary, Theft;
Second case: Possession of Heroin.

Jefferson County - First case: Second-Degree Burglary (three counts), Attempted Second-Degree Burglary (two counts);
Second case: Second-Degree Burglary, Theft;
Third case: Second-Degree Burglary, Aggravated Robbery.

In addition to all these charges, habitual-offender charges have also been filed against Mr. Ball in both Arapahoe County cases, in the second Denver County case and in all three Jefferson County cases. Eight prior convictions are alleged in the Arapahoe and Denver County cases, and five prior convictions are alleged in the Jefferson County cases. The 1957 conviction

is one of the alleged prior convictions in Arapahoe and Denver counties, but not in Jefferson County. At least two of the prior convictions have already been found constitutional by state courts. Alleged in all three counties are the convictions resulting from Mr. Ball's mid-trial counselled guilty pleas in Jefferson County in 1979 discussed above.

In Colorado, a finding of two prior convictions results in imprisonment from 25 to 50 years, and a finding of three or more prior convictions results in life imprisonment. Colo. Rev. Stat. § 16-13-101. A life sentence in Colorado renders a defendant ineligible for parole for a minimum of 40 calendar years. Colorado laws permit life sentences to be imposed consecutively. If Mr. Ball was found guilty of any felony in each of the seven Arapahoe, Denver and Jefferson County cases, and found to have at least three prior convictions, he could receive seven consecutive life sentences, making him ineligible for parole for 280 years.

As of this date, Mr. Ball is in custody in Arapahoe County, and his cases there have been set for trial in August and September of 1986.

ARGUMENT

I. THE STATE OF COLORADO IS NOT NOW ENTITLED TO AN EVIDENTIARY HEARING, WHERE IT HAD NEVER SOUGHT SUCH A HEARING BEFORE RECEIVING AN UNFAVORABLE OPINION FROM THE TENTH CIRCUIT COURT OF APPEALS.

A central focus of the State's petition is its assertion that it has been denied a "full and fair" opportunity "to present available evidence," and that the Tenth Circuit's opinion must be reversed so that the State may now be provided an evidentiary hearing.

In the seven years since Mr. Ball's conviction as a habitual criminal, the first time the State sought an evidentiary hearing was in its Petition for Rehearing in the Tenth Circuit.

The State did not attempt to present any evidence whatsoever at the evidentiary hearing, held at Mr. Ball's request, in the Denver District Court. In fact, the State did not even ask Mr. Ball a single question in cross-examination at that hearing.

The State did not request an evidentiary hearing in the "pretrial proceedings" before the United State Magistrate. In fact, the State expressly agreed then that no further evidentiary hearing was needed.

The State did not request an evidentiary hearing after the Magistrate issued his initial findings, which included findings about the lack of parental notification. In fact, the State later agreed that the Court would not consider the documents, on which it now still relies, that have never been part of any record.

The State did not request an evidentiary hearing after the Magistrate issued his second set of findings, affirming the earlier findings. In fact, the State did not present any oral arguments before the District Court when given the opportunity to

do so.

Instead, the State's first mention of any kind of any need for an evidentiary hearing came when it received an unfavorable ruling from the Tenth Circuit. But even this 11th-hour claim was unaccompanied by any suggestion whatsoever of what additional relevant evidence it would seek to present at such a hearing. See, Battie v. Estelle, 655 F.2d 692, fn. 24 at 703 (5th Cir. 1981): "But even assuming that a party is otherwise entitled to supplement the record in a habeas action at this late date, the State has not offered to show any specific facts that contradict the present record."

Even the six-page probation report (the admissibility of which is open to grave doubts given its completely hearsay nature), which the State alternately relies upon and then withdraws from consideration, would not provide any significant additions. At most, this report only indicates that Mr. Ball's parents were notified of their son's presence in jail, at some unspecified point after his arrest, and from some unidentified source. The State's reliance on this point, moreover, is manifestly misplaced, as a similar contention was expressly rejected in Gault itself. "Mrs. Gault's 'knowledge' of the charge against Gerald, and/or the asserted failure to object, does not excuse the lack of adequate notice." In re Gault, supra, 387 U.S. at 34, fn. 54.

Finally, the transcript of the 1957 plea (which the State stipulated below would constitute the factual record in this case, along with Mr. Ball's uncontradicted testimony at the state-court evidentiary hearing) establishes that the constitutionally-required prior written notice could not have been provided to the parents, for Mr. Ball himself received a written copy of the charges for the first time at the arraignment hearing, only minutes before pleading guilty.

Having deliberately bypassed so many opportunities for an evidentiary hearing, and now still unable to point to any additional evidence it would present, the State has shown no need or entitlement to such relief.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI.

In its Petition, the State of Colorado paraphrases the provisions of Supreme Court Rule 17.1 (a) and (c), but its claims boil down to asserting that the Tenth Circuit was erroneous and that it treated the State unfairly. This assertion, however, does not constitute any special or important reason why this particular case should be again reviewed, nor does it indicate why this case has any importance to the general public beyond the interests of the particular litigants. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

In addition, the State's own failure to respond in a meaningful fashion to rebut Mr. Ball's claims in the numerous proceedings below belies any claims of unfairness in appellate proceedings.

It is also appropriate to examine the limited effect the opinion below will have on even the litigants themselves. Mr. Ball's liberty has proved to be of short duration, and he now is in considerable risk of incurring seven separate life sentences, potentially consecutive, pursuant to Colorado's habitual criminal statutes. This risk is entirely unaffected by the Tenth Circuit's determination that his one prior conviction was unconstitutionally obtained. Merely three prior convictions will subject him to these life sentences--he has been alleged to have as many as seven prior convictions, not counting the 1957 conviction. It will not enhance the sentences any further; its absence will not affect the upcoming habitual proceedings.

Finally, the State urges this Court to use this particular case to resolve definitively the question of what types of constitutional infirmities will render prior convictions unavailable for later penalty enhancement. Even ignoring this cases's lack of appropriateness as such a vehicle given its tangled and unique procedural evolution, this Court should not give much weight to this claim, where none of the State's argument as to this second issue at pages 12 through 15 was presented to the Tenth Circuit below.

The amici curiae, on the other hand, contend that certiorari must be granted to resolve division among the Circuits and the States as to the retroactive application of Gault. Yet no such significant conflict exists. Amici cite only two Federal Circuits--the Third and the District of Columbia--as holding that Gault "does not necessarily apply retroactively." (Amici Brief at 4.) The Third Circuit case cited, however, merely mentioned in dicta that this question had not yet been decided; a later Third Circuit case expressly noted that it had been conceded that uncounselled juvenile adjudications occurring before 1963 (obviously before Gault) were "thus constitutionally invalid." Del Piano v. United States, 575 F.2d 1066, 1067 (3rd Cir. 1978).

The District of Columbia Circuit opinion cited by Amici, Mordecai v. United States, 421 F.2d 1133 (D.C. Cir. 1969), did not hold that Gault was not retroactive. It instead held that the statutory holding in Kent v. United States, 383 U.S. 541 (1966), that a juvenile be afforded counsel at a hearing in which the juvenile court waives or transfers its jurisdiction to an adult criminal court, would not be applied retroactively. Similarly, all of the non-retroactive state-court opinions alluded to by the Amici, except Florida's, discuss retroactivity only in the context of the Kent jurisdictional-waiver hearing. None of these states other than Florida has held that the

procedural protections required by Gault in adjudicatory hearings are not retroactive.

The distinction is significant. In California, for example, a state cited as holding Gault non-retroactive, the Court of Appeals explained that this decision had concerned not Gault as much as it had Kent, and had been in the context only of initial preliminary hearings that would be followed by more procedurally rigorous proceedings. Examining instead "fully adjudicatory" juvenile proceedings, the California Court of Appeals indicated that Gault's protections would be retroactively applied, because the hearing was "the essential truth-finding process." In re J.D.W.B., 8 Cal. App. 3d 103, 87 Cal. Rptr. 178, 183 (1970).

Where, as here, the judicial proceeding involving the juvenile conclusively determines guilt or innocence, the claim that the absence of constitutionally-required procedural safeguards, such as counsel and adequate notice, will not bear on its reliability is without merit.

Moreover, any supposed conflict as to the retroactive effect of Gault is long over. Perhaps a consideration for certiorari in 1967 or 1968 or 1969, any controversy is long over. After all, there simply cannot be many, if any, former juveniles still incarcerated as a result of proceedings conducted more than nineteen years ago, before Gault was decided in 1967. Rather, the only possible party who could still be at all interested in Gault- retroactivity after all this time is the occasional adult defendant whose old pre-Gault, procedurally-defective proceedings continue to be used against him, as the basis for enhanced penalty, as in this case and in United States v. Slipka, 735 F.2d 1064 (8th Cir. 1984), or as impeachment, as in United States v. Rife, 514 F. Supp. 368 (S.D. Ohio 1981). That such occasions are few and far between can be seen by the mere handful of cases

discussing Gault retroactivity in the last fifteen years, and by the silent reaction given the Tenth Circuit's opinion in this case--no court citing it since its issuance (as of the most recently-published Shepherd's now available), no mention in the Criminal Law Reporter or any other similar reporting service to counsel's knowledge.

This case does not present a regularly recurring issue of present controversy and substantial public import. It is, rather, a virtual anachronism, a surviving relic of a branch of doctrine now all but extinct, whose interest is limited to the arcane and the abstract and whose effect is minimal even as to the parties themselves. It is not a worthy candidate for certiorari.

III. THE OPINIONS BELOW WERE CORRECT AND NEED NOT BE REVIEWED BY THIS COURT.

The Tenth Circuit was correct in finding that the manifest lack of the prior parental notice constitutionally required by Gault rendered the 1957 conviction constitutionally unavailable for post-Gault sentence enhancement. In focusing on the effect the lack of Gault protections have on "the integrity of the truth-finding process," the Tenth Circuit merely effectuated this Court's holdings such as Burgett v. Texas, 389 U.S. 109 (1967), invalidating sentence-enhancement use of prior uncounselled plea because such use would in effect renew the prior constitutional deprivation, and Gault itself.

Moreover, were this Court to review the Tenth Circuit's opinion, it would necessarily have to review the District Court's opinion (and the Magistrate's findings on which it was based) as well. The basis of this opinion is a fully adequate alternative ground for affirmance of the granting of habeas corpus relief.

While approving the Magistrate's findings, which included the finding as lack of parental notice, the District Court also

based its holding on the findings that there had been an inadequate determination that Mr. Ball understood the charge against him and that Mr. Ball had not validly waived his right to counsel.

These findings do not require rejection of any state-court factual findings. Their application to the facts in this case, such as Mr. Ball's age and educational difficulties, his lack of parental assistance or counsel's advice, and the "awkward and tortured legal wording of the burglary charge," was clearly correct, and based on correct application of the precedents of this Court.

Accordingly, certiorari is not appropriate even if there were any irregularity in the Tenth Circuit's opinion, as the District Court's opinion adequately supports the result as well.

CONCLUSION

There is no good reason why the opinion in this case, coming at the end of seven years of state and federal proceedings, and concerning the retroactivity of a case decided nineteen years ago, need be reviewed any further.

Respectfully submitted,

James England*
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*Simultaneously with filing this Brief in Opposition, counsel is applying for admission to the Bar of this Court.

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER AND

STATE OF COLORADO

Criminal Action No. 43849

RECEIVED
SEP 1957
CLERK, Court of Appeals

THE PEOPLE OF THE STATE OF COLORADO,	)	
	)	
vs.	)	REPORTER'S TRANSCRIPT
	)	
RICHARD LEE BALL and VICTORIA MARIE DeAGUERO and KENNETH RAY LITSEY and DARRELL KEENE,	)	Defendant Richard Lee Ball
Defendants.	)	

BE IT REMEMBERED that the above-entitled matter came duly on for hearing on Monday, September 30, 1957, before the HONORABLE ROBERT H. McWILLIAMS, JR., Judge of the District Court, Second Judicial District, presiding in Division 9 thereof.

A P P E A R A N C E S:

BERT KEATING, District Attorney, by MARVIN G. ROSENBAUM, Deputy District Attorney, appearing for the People.

MORTON L. COGGAN, Attorney at Law, appearing for Defendant Kenneth Ray Litsey.

ROLLIE R. ROGERS, ROBERT L. McDOUGAL and JOSEPH G. STUDHOLME, Attorneys at Law, appearing for Defendant Darrell Keene.

APPENDIX ONE

PROCEEDINGS

THE COURT: People versus Richard Lee Ball, Victoria Marie DeAguero, Kenneth Ray Litsey, and Darrell Keene.

Who is Richard Lee Ball?

DEFENDANT BALL: Me.

THE COURT: How old are you, Richard Lee Ball?

DEFENDANT BALL: Seventeen.

THE COURT: What?

DEFENDANT BALL: Seventeen.

THE COURT: Is anybody going to enter for Mr. Ball?

DEFENDANT BALL: No, sir.

THE COURT: Victor Marie DeAguero. Who is he?

DEPUTY SHERIFF: I have, that should be Victoria, your Honor.

THE COURT: Well, it is Victoria on the information. You are Victoria Marie DeAguero?

DEFENDANT DeAGUERO: Yes.

THE COURT: How old are you?

DEFENDANT DeAGUERO: Sixteen.

THE COURT: Sixteen?

DEFENDANT DeAGUERO: (Nods.)

THE COURT: Is anybody representing you?

DEFENDANT DeAGUERO: No, sir.

THE COURT: Kenneth Ray Litsey. Who is he?

DEFENDANT LITSEY: Me.

THE COURT: How old are you?

DEFENDANT LITSEY: Seventeen.

THE COURT: Is anybody going to enter for Mr. Litsey?

MR. COGGAN: I am representing Mr. Litsey, your Honor.

THE COURT: The name of Norton L. Coggan then is enter for the third named defendant, Litsey.

By the process of elimination, you are Darrell Keene?

DEFENDANT KEENE: Yes, sir.

THE COURT: Mr. Rogers?

MR. ROGERS: Your Honor, I want to enter my appearanc for Mr. Keene; also note the appearances of my associates, Robert L. McDougal and Joseph Studholme. We will represent Mr. Keene.

THE COURT: I think I will take up the ones who have counsel first. Is Mr. Litsey in jail or on bond?

MR. COGGAN: He's on bond, your Honor.

THE COURT: He's on bond at the present time?

MR. COGGAN: Yes, sir.

THE COURT: Now, the case is up for arraignment today. Is your client ready for arraignment at this time?

MR. COGGAN: No, your Honor. I have just been contacted today, and I would like a copy of the information, and would like a week for arraignment in this matter.

THE COURT: You may approach the bench, Mr. Coggan. The record should reflect that I have given Mr. Coggan a copy of the charges, and I simply ask that, Mr. Coggan, that you bring that back on your next court appearance, so we may utilize it for arraignment purposes.

Now, will one week's time be sufficient?

MR. COGGAN: Yes, sir.

THE COURT: I believe we will continue this until next Monday at 9:00 a.m., for pleading and setting. The bond heretofore entered into will remain in full force and effect, return-

able here a week from today, not in the afternoon session, but in the morning session of court.

Any questions, Mr. Coggan?

MR. COGGAN: I have another matter downstairs. I guess I can manage.

THE COURT: What court?

MR. COGGAN: Division 1 of the Municipal Court.

THE COURT: We can make this 2:00 in the afternoon. It makes no difference to us. Would you prefer to have it at 2:00 in the afternoon?

MR. COGGAN: Let's make it 2:00. Can we?

THE COURT: All right. It will be 2:00 o'clock.

Is Mr. Litsey in school, working, or neither one?

DEFENDANT LITSEY: No, sir. Unemployed.

MR. COGGAN: He is not in school or employed.

THE COURT: So it won't make any difference to him whether it is in the morning session or the afternoon session. He has lots of time.

MR. COGGAN: Let's set it for 2:00 o'clock.

THE COURT: All right, 2:00 o'clock. That's all. You are excused.

We will take up Defendant Keene. How old are you, Mr. Keene?

DEFENDANT KEENE: Seventeen.

THE COURT: Mr. Rogers, where do you stand on this matter of arraignment?

MR. ROGERS: I think, your Honor, I knew about the existence of the matter Friday or Saturday morning, but I would like time to check into it further, and I would like to have our

arraignment continued over until next week at the same time.

THE COURT: You may approach the bench, and I will g
you a copy of the information and simply ask that you bring it
with you when you reappear so we can utilize it for arraignment
Arraignment will be a week from today at 2:00 o'clock. Will th
be satisfactory to you?

MR. ROGERS: Your Honor, that's fine.

THE COURT: The notation insofar as the case against
Keene is concerned is that it is continued at the request of
Keene to the 7th of October at 2:00 o'clock, for arraignment.

Is he in jail or on bond?

MR. ROGERS: He's in jail, your Honor. That's one t
I wanted to call to your Honor's attention. I want to and in-
tend to file this afternoon, or early in the morning, a motion
to reduce, or for a P.R. bond. I think the facts, at least t
I know of them at this time, would justify your Honor's consid
ing that matter. This boy has never been in any trouble befo
and as a matter of fact in this particular case voluntarily
surrendered himself to the authorities when he thought he was
being sought. And he also has signed up and completed all the
steps to go in the Navy, except the actual induction part, an
he has to attend to those matters too. I can file a written
motion asking that your Honor consider that an rule promptly

THE COURT: Well, here's my policy on matters of th
type, Mr. Rogers. You may want to informally and unofficially
contact the District Attorney who is handling the case and fe
if they would acquiesce in your program. If there be agreeme
I probably will go along with the agreement on an informal mi
order basis. Now, if there be disagreement, then I simply

request that you file a written pleading and the written motion will be heard within 48 hours after it is filed. That's the rule that we will follow, if that be agreeable.

MR. ROGERS: Fine. We will go right ahead on that basis then.

THE COURT: We of course all realize that in the last analysis that is is my decision and not the District Attorney's. But if there be agreement, that is one thing; if there be disagreement, I will listen to each side and rule on the matter.

That's all then on the fourth named defendant, Keene.

Now, Richard Lee Ball, the case against you is up for arraignment. By that word, it is meant that if you are ready, I propose to read the charge to you.

DEFENDANT BALL: Yes, sir.

THE COURT: Now, it is my duty I think to advise you first that you have a right to a postponement, if you want, to give you some short time within which to talk to a lawyer.

Now, do you want to talk to a lawyer before you are arraigned in this matter?

DEFENDANT BALL: No, sir.

THE COURT: Mr. Ball, are your parents here in the courtroom perchance?

DEFENDANT BALL: No, sir.

THE COURT: Do you have parents here in Denver?

DEFENDANT BALL: Yes, sir.

THE COURT: Do they know that you are in jail?

DEFENDANT BALL: Yes, sir.

THE COURT: Are they taking any steps to get you out of jail, or get you an attorney?

DEFENDANT BALL: No, sir.

THE COURT: Because of your tender years, you are 17, I think the Court does have to proceed cautiously to make certain that you understand that you have a right to talk with a lawyer. Now, as I understood what you said up to now, you are aware of that fact, but you simply do not desire to talk to a lawyer, and you want to be arraigned right now. Is that the way you feel about the matter?

DEFENDANT BALL: Yes, sir.

THE COURT: Do you understand that you have got an inalienable right to talk to a lawyer and tell him your problem and follow his advice before you are arraigned, and you do not desire to do that, is that correct?

DEFENDANT BALL: Yes, sir.

THE COURT: I don't want to talk you out of it, but I want to make certain that you understand clearly what the issue is. I have a duty under the statutes to appoint counsel if you are indigent. But as I understand it, you want to go ahead and be arraigned right now, is that correct?

DEFENDANT BALL: Yes, sir.

THE COURT: You have thought it over. How long have you been in jail?

DEFENDANT BALL: Nine days.

THE COURT: Nine days? All right, we will arraign you then. That is your wish, correct?

DEFENDANT BALL: Yes, sir.

THE COURT: My clerk, for me, Mr. Richard Lee Ball, will hand to you two documents, the first document is a copy of the charge, and the second document is a copy of the jury list.

Now, you may or may not know that the first count charges you with burglary. I am going to read the charge to you and you might want to follow me as I read. The charge is that Richard Lee Ball, on September 21, 1957, at Denver, Colorado, the office, shop and storehouse there situate of George W. Caughren, doing business as Barnum Creamery, then and there feloniously, burglariously, wilfully, maliciously and forcibly did break and enter, and feloniously, burglariously, wilfully and maliciously without force did enter, with intent, the moneys goods and chattels of the said George W. Caughren, doing business as Barnum Creamery, in the said office, shop and storehouse, then and there being, then and there feloniously and burglariously to steal, take and carry away.

Now, the charge is burglary. How do you want to plead?

DEFENDANT BALL: Guilty, sir.

THE COURT: Now, before I can officially accept your tendered plea of guilty, I have to advise you of your rights, and warn you as to possible consequences of your proposed plea.

Now, I have already talked, I think in considerable detail, as to your most basic right, namely, to be represented by an attorney. And as I mentioned before, if you are without funds, I have the duty to appoint one at state expense.

You have a right to stand trial and let a jury of 12 of your equals listen to the evidence and determine your guilt or innocence.

You have a right to compel the attendance of witnesses who would testify ostensibly in your behalf. You have a right to have the witnesses who would appear against you cross-examined.

On your proposed plea of guilty, you subject yourself

to the possibility of a sentence to a penal institution. The law now reads that I would have the discretion on the one hand to commit you to the State Reformatory for an indeterminate term, and on the other hand, I could commit you to the State Penitentiary at Canon City, Colorado, and you could be kept there for not more than ten years nor less than one year.

Now, being advised and warned, do you still want to plead guilty to this charge of burglary?

DEFENDANT BALL: Yes, sir.

THE COURT: The plea is accepted.

Are you eligible or ineligible, or do you know, to apply for probation?

DEFENDANT BALL: I was on probation when they --

THE COURT: You were on probation? Out of what court?

DEFENDANT BALL: This court.

THE COURT: This court? This very courtroom?

DEFENDANT BALL: I think so.

THE COURT: Who was the judge who presided over your case?

DEFENDANT BALL: I don't remember.

THE COURT: I don't believe I did.

DEFENDANT BALL: No.

THE COURT: If you were eligible for probation, would you want to apply?

DEFENDANT BALL: Yes, sir.

THE COURT: I will enter an order granting you leave to apply for probation. If you are ineligible, certainly no harm will be done by permitting you to apply. The probation office will be over to see you Friday morning. They will take your

written application and they will want the answers to these questions which appear on that sheet of paper. You might spend some of your spare time in the interim preparing your answers.

Now, it will take them a month to complete their investigation. Accordingly, at this time I will continue this case as it relates to Ball to the 28th of October, at the hour of 9:00 o'clock a.m., at which time I desire, Mr. District Attorney, to hear evidence, and at which time I will rule on your application for probation.

Now, do you have any questions, Mr. Ball?

DEFENDANT BALL: No, sir.

THE COURT: That's all.

You are in jail, are you not?

DEFENDANT BALL: Yes, sir.

THE COURT: You may step back into the prisoner's box.

Now, Victoria Marie DeAguero, that is you?

DEFENDANT DeAGUERO: Yes, sir.

* * * * *

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Otto Ulrich, do hereby certify that I am a Certifie Shorthand Reporter within and for the State of Colorado, Officia Reporter for the Second Judicial District of the District Court, at Denver, Colorado; that as such reporter, I was present upon the occasion of the proceedings conducted in the above-entitled matter, at the time and place as hereinabove set forth; that I stenographically recorded all proceedings had, and that the above and foregoing constitutes a true and correct transcript of my said shorthand notes, so taken as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand this 22nd day of January, 1979.

OTTO ULRICH

Subscribed and sworn to before me this 22 day of JANUARY, 1979.

Paul R. Davis
Notary Public

My Commission expires: My Commission expires December 7, 1980

(Colo. 1982); People v. Thompson, 655 P.2d 416 (Colo. 1982); People v. Pipkin, 655 P.2d 1360 (Colo. 1982); People v. Olds, 656 P.2d 705 (Colo. 1983); People v. Allen, 657 P.2d 447 (Colo. 1983); People v. Clements, 661 P.2d 267 (Colo. 1983); People v. Luciano, 662 P.2d 480 (Colo. 1983); People in Interest of P.J.N., 664 P.2d 245 (Colo. 1983).

Applied in People v. Rael, 198 Colo. 225, 597 P.2d 584 (1979); People v. Hight, 198 Colo. 299, 599 P.2d 885 (1979); People v. Jenkins, 198 Colo. 347, 599 P.2d 912 (1979); People v. Waggoner, 199 Colo. 450, 610 P.2d 106 (1980); People v. District Court, 623 P.2d 55 (Colo. 1981); People v. Torres, 625 P.2d 368 (Colo. 1981); People v. Boyd, 642 P.2d 1 (Colo. 1982); People v. Ray, 678 P.2d 1019 (Colo. 1984).

ARTICLE 13

Special Proceedings

PART 1

SENTENCING OF HABITUAL CRIMINALS

16-13-101. Punishment for habitual criminals.
16-13-102. Evidence of former convictions — identity.
16-13-103. Verdict of jury.

PART 2

SENTENCING OF SEX OFFENDERS

16-13-215. Diagnostic center as receiving center.
16-13-216. Powers and duties of the board.

PART 3

ABATEMENT OF PUBLIC NUISANCE

16-13-301. Definitions.
16-13-303. Class 1 public nuisance.
16-13-304. Class 2 public nuisance.
16-13-308. Temporary restraining order — preliminary injunction — when to issue.
16-13-309. Judgment — relief.
16-13-310. Redelivery of seized premises.
16-13-311. Disposition of seized personal property.
16-13-313. Fees — costs and fines — lien and collection.
16-13-314. Disposition of forfeited real property.

PART 5

COLORADO CONTRABAND FORFEITURE ACT

16-13-501. Short title.
16-13-502. Definitions.
16-13-503. Subject acts.
16-13-504. Forfeiture of vehicle, fixtures and contents of building, personal property, or contraband article — exceptions.
16-13-505. Forfeiture proceedings.
16-13-506. Final order — disposition of property.
16-13-507. Disposition of contraband article or property.
16-13-508. Forfeitures.

PART 1

SENTENCING OF HABITUAL CRIMINALS

16-13-101. Punishment for habitual criminals. (1) Every person convicted in this state of any felony for which the maximum penalty prescribed by law exceeds five years who, within ten years of the date of the commission of the said offense, has been twice previously convicted upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would

. a felony shall be adjudged an habitual c .minal and shall be punished by confinement in a correctional facility for a term of not less than twenty-five years nor more than fifty years.

(2) Every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony or, under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States, of a crime which, if committed within this state, would be a felony, shall be adjudged an habitual criminal and shall be punished by imprisonment in a correctional facility for the term of his or her natural life. Such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment or information. Nothing in this part 1 shall abrogate or affect the punishment by death in any and all crimes punishable by death on or after July 1, 1972.

Source: Amended, L. 79, p. 683, § 16; amended, L. 81, p. 948, § 1.

Law reviews.

For article, "Attacking Prior Convictions in Habitual Criminal Cases: Avoiding the Third Strike", see Colo. Law. 1225 (1982). For article, "Colorado Felony Sentencing", see 11 Colo. Law. 1478 (1982). For article, "Colorado's Habitual Criminal Act: An Overview", see 12 Colo. Law. 215 (1983). For article, "Criminal Procedure", which discusses a recent Tenth Circuit decision dealing with double jeopardy and habitual criminal adjudications, see 61 Den. L.J. 299 (1984).

This section must be strictly construed.

The habitual criminal statute shall be narrowly construed in favor of the accused. People v. Nees, 200 Colo. 392, 615 P.2d 690 (1980).

The habitual criminal act does not create a new crime.

The habitual criminal statute does not define a substantive offense but relates to sentencing enhancement for the underlying felony. People v. Montoya, 640 P.2d 234 (Colo. App. 1981); People v. Watkins, 684 P.2d 234 (Colo. 1984).

Constitutional protection against double jeopardy applies to defendant prosecuted as habitual criminal. People v. Quintana, 634 P.2d 413 (Colo. 1981); People v. Mason, 643 P.2d 745 (Colo. 1982).

Section does not violate separation of powers. This section does not delegate to prosecutors the power to define criminal conduct, and thus does not run afoul of the constitutional limitations on separation of powers. People v. Gallegos, 644 P.2d 920 (Colo. 1982).

Nor does this section constitute cruel and unusual punishment.

In accord with original. See People v. Martinez, 689 P.2d 653 (Colo. App. 1984).

The absence of sentencing discretion, even when coupled with a prescribed life sentence, does not render subsection (2) of this section facially invalid as violative of the prohibition of cruel and unusual punishments in § 20 of art. II, Colo. Const. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

The uniquely grave nature of the death penalty is the wellspring from which flows the constitutional requirement that mitigating factors be considered in sentencing notwithstanding the number or seriousness of a defendant's prior offenses. No such requirement is included within the Colorado constitution's prohibition of cruel and unusual punishments as applied to the sentencing of habitual criminals. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

No denial of equal protection, etc.

In prescribing a specific inflexible sentence to life imprisonment for persons found to be habitual criminals on the basis of three prior felony convictions, while allowing various degrees of flexibility in sentencing other offenders, the legislature has not denied such habitual criminals the equal protection of the laws. People v. Gutierrez, 622 P.2d 547 (Colo. 1981); People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

U.S. Supreme Court decision in Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed.2d 637 (1983), requires consideration of whether the lack of violence in convictions supporting a finding of habitual criminality is proportional to the life sentence imposed. People v. Hernandez, 686 P.2d 1325 (Colo. 1984).

CERTIFICATE OF SERVICE

I, James England, counsel of record for Respondent Richard Lee Ball, do hereby certify that on July 17th, 1986, I served a copy of the attached Brief in Opposition on counsel for Petitioner, and a copy on counsel for Amici Curiae, by depositing each in the United States Mail, postage prepaid, addressed as follows:

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